

## Note

### ***Indest v. Freeman Decorating, Inc.: Dealing with Vicarious Liability for Sexual Harassment by a Supervisor***

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IMAGINE A COMPANY that has been at the forefront of a movement in its community to eliminate all types of harassment in the workplace.<sup>1</sup> The company instituted a harassment avoidance program nearly five years ago, which was applicable to the company's entire work force. As part of the program, the company holds regular training sessions with all employees to educate veteran employees about changes within the program and to inform new employees of its existence and procedures. "If you feel that you've been harassed," the company tells its employees, "there is a confidential grievance procedure, and your complaint will be investigated immediately." The employees are also assured that the company will not tolerate any retaliation by an accused employee. Recent statistics show that the program has virtually eliminated harassment in the workplace.

Assume further that despite these preventative efforts, a wayward supervisor sexually harasses a female employee. The employee promptly reports it through the company's confidential procedure. An investigation is immediately commenced, which results in the discharge of the harassing supervisor. Despite the prompt action by the company, however, the harassed employee continues to feel uncomfortable at work, and files suit against the company alleging sexual harassment under Title VII.<sup>2</sup> How will the courts deal with this or a similar situation?

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\* Class of 2001. I would like to recognize the loving and intellectual support of my wife, Katy Raytis, Boalt Hall, Class of 2001.

1. This hypothetical is fictional and is not based on actual events.

2. 42 U.S.C. § 2000e-2(a)(1) (1994). Title VII states: "(a) It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation,

The United States Supreme Court recently imposed vicarious liability on employers for sexual harassment committed by a supervisor in *Burlington Industries, Inc. v. Ellerth*<sup>3</sup> and *Faragher v. City of Boca Raton*.<sup>4</sup> Additionally, the Court created an affirmative defense for employers that requires an employer to prove "two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."<sup>5</sup> Under *Ellerth/Faragher*, the employer in the above hypothetical would be liable, regardless of the preventative and remedial measures it had taken.<sup>6</sup> This is because an employee who has acted reasonably in reporting harassing conduct eliminates the possibility of the employer proving the second element of the affirmative defense, which makes the first element of the affirmative defense—an employer's conduct to prevent or remedy a harassing situation—irrelevant.<sup>7</sup> Despite this United States Supreme Court mandate, a recent opinion of the Fifth Circuit Court of Appeals, *Indest v. Freeman Decorating, Inc.*,<sup>8</sup> demonstrates the reluctance of lower courts to impose liability on an employer that has taken steps to remedy or prevent harassment that does occur, even though an employee acts reasonably in reporting the conduct.<sup>9</sup>

Part I of this Note examines *Meritor Savings Bank, FSB v. Vinson*,<sup>10</sup> the seminal United States Supreme Court decision addressing an employer's liability for sexual harassment by a supervisor.<sup>11</sup> Part I also discusses the development of the hostile work environment theory of

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terms, conditions or privileges of employment, because of such individual's . . . sex . . . ." *Id.*

3. 524 U.S. 742 (1998).

4. 524 U.S. 775 (1998). These opinions adopted the same holding and were both issued on June 26, 1998. Therefore, this Note commonly refers to the cases and their holdings collectively as *Ellerth/Faragher*.

5. *Ellerth*, 524 U.S. at 765.

6. *See id.* at 773 (Thomas, J., dissenting) (noting that despite an employer's prompt response, an employee acting reasonably by immediately reporting offensive conduct, thereby eliminates the employer's affirmative defense under *Ellerth/Faragher*); *see also* discussion *infra* Part IV.

7. *See id.* at 773 (Thomas, J., dissenting).

8. 164 F.3d 258 (5th Cir. 1999).

9. *See id.* at 267 (noting that the prompt remedial response by the employer removes liability for sexual harassment).

10. 477 U.S. 57 (1986).

11. *See id.* at 63–69.

sexual harassment recognized by the Supreme Court in *Meritor*.<sup>12</sup> Part II explains the Supreme Court's new standard of liability and the reasoning it provided for creating the affirmative defense enunciated in *Ellerth/Faragher*. Part III, the focus of this Note, analyzes two separate opinions issued by a panel of the Fifth Circuit in *Indest*. Part IV considers *Indest's* assessment of *Ellerth* and *Faragher* and attempts a proper analysis of the facts of *Indest* under the *Ellerth/Faragher* decisions. It also analyzes the elements and effect of the affirmative defense on employer liability. Part V proposes an alternative defense that focuses primarily on the employer's actions and allows an employer to escape liability with proof of its reasonable behavior both before and after a harassing situation arises. This Note concludes that such an approach would alleviate the apparent concerns of the *Indest* court and would better serve the United States Supreme Court's reasoning for creating the *Ellerth/Faragher* affirmative defense.

## I. Background: Developments in Title VII Sexual Harassment

### A. *Meritor Savings Bank, FSB v. Vinson*—Recognizing the Hostile Work Environment As Actionable Sexual Harassment

The United States Supreme Court first recognized that sexual harassment was actionable under a hostile work environment theory in *Meritor Savings Bank, FSB v. Vinson*.<sup>13</sup> The plaintiff, Michelle Vinson, alleged that she had been subjected to sexual harassment by the vice president of the defendant bank.<sup>14</sup> She had been employed at the bank for four years, had been promoted from teller to head teller, and eventually became assistant branch manager.<sup>15</sup> She specifically alleged that the vice president, Sidney Taylor, forced her to have sexual relations with him through repeated demands, which she felt she could not refuse.<sup>16</sup> After being discharged from the bank for excessive

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12. This Note does not examine sexual harassment that results in a tangible employment decision, such as hiring, firing, or demotion. In this area, courts have long held that the employer is strictly liable for sexual harassment by a supervisor. *See id.* at 76 (Marshall, J., concurring) (citing appellate court decisions which have held that sexual harassment by a supervisor is automatically imputed to the employer when the harassment results in tangible job detriment to the harassed employee).

13. 477 U.S. 57, 66 (1986). The Court explained that "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment." *Id.*

14. *See id.* at 60.

15. *See id.* at 59–60.

16. *See id.* at 60. Vinson alleged that she had sexual relations with Taylor forty to fifty times, including occasions where he had forcibly raped her. *See id.*

use of sick leave, Vinson filed suit against the bank and Taylor claiming sexual harassment in violation of Title VII.<sup>17</sup> The district court denied relief, citing the voluntary nature of the relationship and the fact that it did not have an adverse effect on Vinson's advancement at the bank.<sup>18</sup> The Court of Appeals for the District of Columbia Circuit reversed the trial court's decision and recognized a hostile work environment theory of recovery.<sup>19</sup>

The United States Supreme Court agreed with the court of appeals that unwelcome sexual advances that create an offensive or hostile working environment violate Title VII.<sup>20</sup> In addition, the opinion rejected the defendant's argument that tangible, economic loss was required to find harassment actionable under Title VII.<sup>21</sup> The Court reasoned that "the language of Title VII is not limited to 'economic' or 'tangible' discrimination."<sup>22</sup> The Court accepted Equal Employment Opportunity Commission ("EEOC") guidelines which prohibited "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature."<sup>23</sup>

In an attempt to provide some guidance for hostile work environment cases, the Supreme Court noted that "not all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment within the meaning of Title VII."<sup>24</sup> The opinion further instructed that "[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"<sup>25</sup> However, the Court did not present any factors, or provide further guidance, on how to determine whether certain conduct rises to the level of a hostile work environment.

## **B. *Harris v. Forklift Systems, Inc.*—Refining the Hostile Work Environment**

In an attempt to clarify the level of conduct actionable as a hostile work environment claim, the United States Supreme Court revisited

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17. See *id.*

18. See *Vinson v. Taylor*, 23 F.E.P. Cases 37, 42 (D.D.C. 1980).

19. See *Vinson v. Taylor*, 753 F.2d 141, 145 (D.C. Cir. 1985) (relying on *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981)).

20. See *Meritor*, 477 U.S. at 64.

21. See *id.*

22. *Id.*

23. *Id.* at 65 (quoting 29 C.F.R. § 1604.11(a) (1985)).

24. *Id.* at 67.

25. *Id.* (quoting *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971)).

the issue in *Harris v. Forklift Systems, Inc.*<sup>26</sup> In *Harris*, the company president, Charles Hardy, frequently made sexually degrading comments and sexual innuendos to the plaintiff, Teresa Harris.<sup>27</sup> After two years, Harris quit and sued Forklift claiming that Hardy's conduct created an abusive work environment for her because of her gender.<sup>28</sup> The district court held that Hardy's conduct did not create an abusive environment, focusing primarily on whether the conduct seriously affected the plaintiff's psychological well-being.<sup>29</sup> The Court of Appeals for the Sixth Circuit affirmed in an unpublished opinion.<sup>30</sup> The Supreme Court granted certiorari<sup>31</sup> in light of the conflict among circuit courts over whether serious psychological harm or injury is required for conduct to be actionable under a hostile work environment theory.<sup>32</sup>

In *Harris*, a unanimous Supreme Court reversed the appellate court's decision and remanded, holding that the conduct need not seriously affect an employee's psychological well-being or lead the employee to suffer injury.<sup>33</sup> The Court reaffirmed *Meritor's* "severe and pervasive" standard, noting that it "takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury."<sup>34</sup> The *Harris* Court further clarified the *Meritor* standard, stating:

Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.<sup>35</sup>

The opinion instructed that in making this determination, a court must look at all of the circumstances, which "may include the

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26. 510 U.S. 17 (1993).

27. See *id.* at 19.

28. See *id.*

29. See *id.* at 20.

30. See *id.*; see also *Harris v. Forklift Sys., Inc.*, 976 F.2d 733 (1992) (judgment order).

31. See *Harris v. Forklift Sys., Inc.*, 507 U.S. 959 (1993) (granting certiorari).

32. See *Harris*, 510 U.S. at 20 (comparing *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 620 (6th Cir. 1986) (requiring serious effect on psychological well-being), *Vance v. S. Bell Tel. & Tel. Co.*, 863 F.2d 1503, 1510 (11th Cir. 1989) (same), and *Downes v. FAA*, 775 F.2d 288, 292 (Fed. Cir. 1985), with *Ellison v. Brady*, 924 F.2d 872, 877–78 (9th Cir. 1991) (rejecting a requirement of serious effect on psychological well-being)).

33. See *id.* at 22.

34. *Id.* at 21.

35. *Id.* at 21–22.

frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."<sup>36</sup>

### C. Setting the Standard for Employer Liability

Before *Ellerth/Faragher*, *Meritor* was the only case from the United States Supreme Court addressing the standard for employer liability in cases of sexual harassment by a supervisor. Although the *Meritor* Court "decline[d] the parties' invitation to issue a definitive rule on employer liability," it held that "the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors."<sup>37</sup> The court of appeals had imposed strict liability regardless of whether the employer knew or should have known about the harassing conduct.<sup>38</sup> The Supreme Court found that other factual issues needed to be resolved before making a determination of liability,<sup>39</sup> but further explained that "Congress wanted courts to look to agency principles for guidance in this area."<sup>40</sup>

The Court considered imposing either a strict liability or negligence standard on employers for sexual harassment by a supervisor.<sup>41</sup> The plaintiff-employee argued Title VII's definition of "employer" includes agents,<sup>42</sup> and therefore urged strict liability under the theory that "the supervisor is the employer and the employer is the supervisor."<sup>43</sup> The defendant-employer countered that notice should be required.<sup>44</sup> Lack of notice would absolve the employer of liability because the plaintiff had failed to use the employer's established grievance procedure, thereby denying the employer an opportunity to respond.<sup>45</sup>

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36. *Id.* at 23.

37. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986).

38. *See id.* at 63 (citing *Vinson v. Taylor*, 753 F.2d 141 (D.C. Cir. 1985)).

39. *See id.* at 72.

40. *Id.*

41. *See id.* at 70-72.

42. An "agent" is generally defined as "[a] person authorized by another (principal) to act for or in the place of him; one entrusted with another's business." BLACK'S LAW DICTIONARY 63 (6th ed. 1990).

43. *Meritor*, 477 U.S. at 70 (quoting Brief of Respondent Michelle Vinson at 27, *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986) (No. 84-1979)).

44. *See id.*

45. *See id.*

The Court also entertained arguments from the EEOC as amicus curiae.<sup>46</sup> The EEOC distinguished between cases in which the supervisor uses actual authority delegated by the employer, such as threats to affect the employment status of an employee, and those that involve a "hostile working environment,"<sup>47</sup> where no tangible job action is taken.<sup>48</sup> In the former cases, the EEOC advocated imputing those actions "to the employer whose delegation of authority empowered the supervisor to undertake [those actions]."<sup>49</sup> In the latter cases, the EEOC suggested that the "usual basis for a finding of agency will often disappear."<sup>50</sup> The EEOC determined that, in the "hostile environment" cases, a proper rule looks to the efforts of the employer to prevent and correct harassment, and the steps the employee took to notify the employer of such harassment.<sup>51</sup>

Although the Court discussed the parties' arguments, the opinion did not come to a definitive conclusion regarding liability.<sup>52</sup> The Justices did "not know at this stage whether [the supervisor] made any sexual advances toward[s] [the employee] at all, let alone whether those advances were [actionable]."<sup>53</sup> The Court simply found that Congress intended some limit on employer liability for the acts of its employees and instructed lower "courts [to] look to agency principles for guidance in this area."<sup>54</sup>

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46. See *id.* at 70–71.

47. See *id.*; see also *supra* text accompanying note 35 (describing *Meritor's* definition of hostile work environment).

48. See *Meritor*, 477 U.S. at 70–71. A tangible employment action is defined as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

49. *Meritor*, 477 U.S. at 70 (quoting Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae at 22, *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986) (No. 84-1979)).

50. *Id.* at 71 (quoting Brief for the United States and EEOC as Amici Curiae at 26, *Meritor* (No. 84-1979)).

51. See *id.* The EEOC noted that "[i]f the employer has an expressed policy against sexual harassment and has implemented a procedure specifically designed to resolve sexual harassment claims, and if the victim does not take advantage of that procedure, the employer should be shielded from liability absent actual knowledge of the sexually hostile environment." *Id.*

52. See *id.* at 72.

53. *Id.* The Court relied upon the district court's opinion for a summary of the relevant facts because it was not provided with a complete trial transcript. See *id.* at 60 n.†.

54. *Id.* at 72. "Congress' decision to define 'employer' to include any 'agent' of the employer . . . surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible." *Id.*

However, *Meritor* provided some guidance in that it expressly rejected the employer's view that the mere existence of a discrimination policy and grievance procedure, combined with the plaintiff's failure to use this policy, was enough to shield the employer from liability.<sup>55</sup> The Court noted specifically that the defendant-employer's policy was inadequate in two areas: it did not mention sexual harassment, and the only avenue of redress available to the employee was to report the harassment to his or her immediate supervisor, in this case the alleged harasser.<sup>56</sup> However, it ultimately concluded that "the Court of Appeals was wrong to entirely disregard agency principles and impose absolute liability on employers for the acts of their supervisors, regardless of the circumstances of a particular case."<sup>57</sup>

Four Justices concurred in the judgment of the Court,<sup>58</sup> but asserted that the majority should have decided the issue of employer liability.<sup>59</sup> The concurring Justices determined that strict liability was the appropriate rule governing employer liability for harassment by a supervisor, regardless of the employer's knowledge.<sup>60</sup> The concurrence reasoned, "[i]n both [tangible job detriment and hostile work environment] cases[,] it is the authority vested in the supervisor by the employer that enables him to commit the wrong."<sup>61</sup>

The concurring opinion rejected an argument presented by the Solicitor General<sup>62</sup> that advocated for a notice requirement for employers—i.e., that the employers have some sort of actual or constructive knowledge of the harassing conduct before being held liable—in cases that involve a discriminatory work environment, as opposed to those which affect tangible job benefits.<sup>63</sup> The concurring Justices noted, however, that agency principles and the goals of Title VII require some limit on employer liability for acts of supervisors.<sup>64</sup> Nevertheless, the concurring Justices concluded that "[t]here is . . . no justification for a special rule, to be applied *only* in 'hostile environment' cases, that sexual harassment does not create employer liability

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55. *See id.*

56. *See id.* at 72–73.

57. *Id.* at 73.

58. *See id.* at 74 (Marshall, J., concurring). Justice Marshall was joined by Justice Brennan, Justice Blackmun, and Justice Stevens. *See id.*

59. *See id.* (Marshall, J., concurring).

60. *See id.* at 78 (Marshall, J., concurring).

61. *Id.* at 76–77 (Marshall, J., concurring).

62. The Solicitor General filed a brief as amicus curiae on behalf of the United States and the EEOC. *See id.* at 76 (Marshall, J., concurring).

63. *See id.* (Marshall, J., concurring).

64. *See id.* at 77 (Marshall, J., concurring).



until the employee suffering the discrimination notifies other supervisors."<sup>65</sup>

## II. *Ellerth/Faragher*: A New Standard of Employer Liability

### A. The Facts and Procedural History

#### 1. *Burlington Industries, Inc. v. Ellerth*

In *Ellerth*, the plaintiff, Kimberly Ellerth, worked as a salesperson for Burlington Industries, Inc. ("Burlington") for approximately fourteen months.<sup>66</sup> She alleged that Ted Slowik, a manager in her department, continually subjected her to sexual harassment.<sup>67</sup> Slowik was not Ellerth's immediate supervisor.<sup>68</sup> However, Ellerth reported to an individual in the company who reported to Slowik, and therefore Slowik had "successively higher" authority over Ellerth.<sup>69</sup> Ellerth's allegations focused on three incidents of verbal sexual harassment by Slowik.<sup>70</sup> Soon after the third incident, Ellerth quit, without stating that her departure was due to Slowik's sexual advances.<sup>71</sup>

Ellerth filed suit in district court, alleging sexual harassment and constructive discharge in violation of Title VII.<sup>72</sup> The district court found that Slowik's behavior was actionable, but granted summary judgment in favor of Burlington, because the company neither knew nor should have known of the offending conduct.<sup>73</sup> Although the Court of Appeals for the Eighth Circuit reversed *en banc*, the decision contained eight opinions, which primarily focused on whether vicarious liability was the proper standard for quid pro quo sexual harassment, as opposed to hostile environment cases.<sup>74</sup>

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65. *Id.* (Marshall, J., concurring).

66. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 747 (1998).

67. *See id.*

68. *See id.*

69. *See id.*

70. *See id.* at 748. In the first incident, Slowik made comments about Ellerth's breasts and stated that "I could make your life very hard or very easy at Burlington." *Id.* The second incident, which occurred almost a year after the first, involved Slowik stating that he had reservations about Ellerth's prospects for promotion because she was not "loose enough." *Id.* In the third incident, Slowik commented that he would not discuss business with Ellerth unless she discussed what she was wearing and, furthermore, that wearing shorter skirts would make her life at work easier. *See id.*

71. *See id.*

72. *See id.* at 749.

73. *See id.*

74. *See id.* at 749-51 (discussing *Jansen v. Packaging Corp. of America*, 123 F.3d 490 (7th Cir. 1997) (per curiam)). Cases in which a supervisor threatens to take a tangible employment action in exchange for sexual relations are referred to as quid pro quo. *See id.*

## 2. *Faragher v. City of Boca Raton*

For approximately five years, Beth Faragher worked as a lifeguard for the City of Boca Raton, Florida ("City").<sup>75</sup> One year after Faragher began working as a lifeguard, the City instituted a sexual harassment policy, of which neither Faragher nor any of the other lifeguards were informed.<sup>76</sup> Faragher filed suit against the City two years after resigning from the lifeguard position, alleging that two of her three supervisors continuously harassed her and other female employees.<sup>77</sup> Faragher had discussed the harassing behavior with her non-harassing supervisor, but she failed to report it further or take any other action.<sup>78</sup> Before Faragher resigned, another employee complained of sexual harassment, and the City responded by reprimanding the supervisors and requiring them to choose between a suspension without pay or the forfeiture of annual leave.<sup>79</sup>

The district court found the City liable on three grounds: (1) the harassment was pervasive enough to put the City on notice; (2) the supervisors were acting as agents of the City when they committed the harassment; and (3) even the third supervisor Faragher reported the incidents to failed to take action.<sup>80</sup> A panel of the Court of Appeals for the Eleventh Circuit reversed the district court's judgment on Faragher's Title VII sexual harassment claim against the City, rejecting all of the district court's reasons for imputing liability to the City.<sup>81</sup> The court of appeals, sitting *en banc*, affirmed the panel's conclusion.<sup>82</sup> The court held that an employer could be vicariously liable for a hostile work environment if the harassment occurs within the scope of employment, or if there was an agency relationship which aids the supervisor in committing the harassment.<sup>83</sup>

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at 751. Prior to *Ellerth/Faragher*, lower courts had imposed vicarious liability on employers in cases of quid pro quo harassment. *See id.* at 753 (citations omitted). Reversing this trend, the Supreme Court in *Ellerth* held that quid pro quo harassment, where the threats are not carried out, should be categorized as hostile environment cases, requiring a showing of severe or pervasive conduct. *See id.* at 753-54.

75. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 780 (1998).

76. *See id.* at 781-82.

77. *See id.* at 780.

78. *See id.* at 782.

79. *See id.* at 783.

80. *See id.*

81. *See Faragher v. City of Boca Raton*, 76 F.3d 1155, 1168 (11th Cir. 1996).

82. *See Faragher v. City of Boca Raton*, 111 F.3d 1530, 1539 (11th Cir. 1997) (*en banc*).

83. *See id.* at 1535. The court of appeals additionally held that an employer could be vicariously liable for a hostile environment if the employer assigns performance of non-delegable duties to a supervisor and an employee is harmed as a result thereof. *See id.* This

## B. The Supreme Court's Holding

The Supreme Court revisited the issue of employer liability for sexual harassment by a supervisor due to the confusion created by the absence of a controlling standard.<sup>84</sup> Contrary to *Meritor's* implicit instructions prohibiting strict liability from being imposed on an employer for the harassing conduct of a supervisor, the Court held that "[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee."<sup>85</sup> However, the Court circumvented stare decisis principles by providing an affirmative defense for employers to be applied in cases where no "tangible employment action" is taken against an employee.<sup>86</sup>

The affirmative defense consists of two elements. The employer must prove: "(a) that [it] exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."<sup>87</sup> The Court provided little guidance regarding the use of the affirmative defense. It stated that the existence of an anti-harassment policy was not necessary as a matter of law, but the need for such a policy is taken into consideration when litigating the first element.<sup>88</sup>

The Court explained that proving the second element is not "limited to showing any unreasonable failure to use any complaint procedure provided by the employer, [but] a demonstration of such failure will normally suffice to satisfy the employer's burden."<sup>89</sup> Nevertheless,

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Note does not address this holding because the Supreme Court imposed vicarious liability by analyzing solely those holdings referred to in the text.

84. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 751 (1998). The Supreme Court noted that the court of appeals decision produced eight separate opinions and no consensus for a controlling rationale. See *id.* at 749; see also *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) (noting the same).

85. *Ellerth*, 524 U.S. at 765.

86. See *id.* The Court left previous law unchanged, imposing vicarious liability on employers for sexual harassment that results in a tangible employment action. See *id.* at 760-63.

87. *Id.* at 765.

88. See *id.* The Court provided implicit guidance by holding, in *Faragher*, that the City did not exercise reasonable care as a matter of law. See *Faragher*, 524 U.S. at 808. The facts relevant to this determination were: (1) the City did not distribute the policy to beach employees; (2) the City's officials did not keep track of beach supervisors; and (3) the City's sexual harassment policy did not include any assurance that the harassing supervisors could be bypassed in registering complaints. See *id.*

89. *Ellerth*, 524 U.S. at 765.

an employer can prove the elements of the affirmative defense only if the employer acts reasonably by instituting a harassment grievance policy and procedure and responds promptly to harassing conduct, *and* the employee fails to act reasonably by not reporting the harassing conduct to the employer in a timely manner or avoiding harm otherwise.<sup>90</sup>

### C. The Supreme Court's Reasoning

#### 1. Agency Principles

The Supreme Court, in both *Ellerth* and *Faragher*, focused primarily on the Restatement of Agency<sup>91</sup> for guidance in determining the standard for employer liability.<sup>92</sup> The Court relied on agency principles, as expressly mandated by Congress and *Meritor*.<sup>93</sup>

##### a. Scope of Employment Analysis

The Court, in *Ellerth*, began its analysis by discussing whether sexual harassment is within the scope of employment.<sup>94</sup> The majority referred to section 219(1) of the Restatement, which states that "[a] master is subject to liability for the torts of his servants committed while acting in the scope of their employment."<sup>95</sup> The Court noted that both intentional and negligent conduct could be imputed to the employer under this section.<sup>96</sup> However, this broad rule generally requires that the employee's purpose in committing the act be to serve the employer.<sup>97</sup> In regard to sexual harassment, *Ellerth* reasoned that the "harassing supervisor often acts for personal motives, motives unrelated and even antithetical to the objectives of the employer."<sup>98</sup> Therefore, the Court concluded that sexual harassment is not conduct within the scope of employment.<sup>99</sup>

The *Faragher* opinion approached this problem differently, noting that cases outside Title VII define the scope of employment broadly enough to include intentional torts that in no way serve a pur-

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90. *See id.*

91. RESTATEMENT (SECOND) OF AGENCY § 219(1) (1958).

92. *See Faragher*, 524 U.S. at 797-803; *see also Ellerth*, 524 U.S. at 754-63.

93. *See Ellerth*, 524 U.S. at 754-55.

94. *See id.* at 755-56.

95. RESTATEMENT (SECOND) OF AGENCY § 219(1) (1958).

96. *See Ellerth*, 524 U.S. at 756.

97. *See id.*

98. *Id.* at 757.

99. *See id.*

pose of the employer.<sup>100</sup> Nevertheless, several courts dealing with Title VII have found sexual harassment to be outside the scope of employment.<sup>101</sup> The Court explained this tension as resulting from “differing judgments about the desirability of holding an employer liable for his subordinates’ wayward behavior.”<sup>102</sup> The Court inquired “into the reasons that would support a conclusion that the harassing behavior ought to be within the scope of a supervisor’s employment, and the reasons for the opposite view.”<sup>103</sup>

The *Faragher* opinion found that the only way sexual harassment may be considered within the scope of employment was to include it as a cost of doing business.<sup>104</sup> The rationale for placing the costs on the employer “would be the fairness of requiring the employer to bear the burden of foreseeable social behavior, and the same rationale would apply when the behavior was that of co-employees.”<sup>105</sup> However, in rejecting this view, the Court reasoned that sexual harassment is generally not committed to serve any interest of the employer, thus placing it beyond the scope of employment under traditional agency law.<sup>106</sup> In support of its analysis, the Court noted the unanimity among lower courts in applying a negligence standard to analyze an employer’s liability for co-worker harassment.<sup>107</sup>

#### **b. Aided in the Agency Principle**

The *Ellerth/Faragher* opinions continued with an analysis of section 219(2)(d) of the Restatement of Agency,<sup>108</sup> which states, “[a] master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless . . . the servant . . . was *aided in accomplishing the tort by the existence of the agency relation*.”<sup>109</sup> It is within the “aided in the agency” principle that the Court found the authority to impose vicarious liability on employers.

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100. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 794 (1998).

101. See *id.* at 793–94 (citations omitted).

102. *Id.* at 796.

103. *Id.* at 797.

104. See *id.* at 798.

105. *Id.* at 800.

106. See *id.* at 798.

107. See *id.* at 799–800. “If, indeed the cases did not rest, at least implicitly, on the notion that such harassment falls outside the scope of employment, their liability issues would have turned simply on the application of the scope-of-employment rule.” *Id.* at 800.

108. RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1958). See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 758 (1998); *Faragher*, 524 U.S. at 801.

109. RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (emphasis added).

The *Ellerth* Court acknowledged that almost all workplace harassment is accomplished by the existence of an agency relationship.<sup>110</sup> Strict use of section 219(d)(2) would thus create automatic liability for employers based on all workplace harassment.<sup>111</sup> *Meritor*, however, had concluded that employer liability should not be automatic.<sup>112</sup> Therefore, the *Ellerth* Court stated, “[t]he aided in the agency relation standard . . . requires the existence of something more than the employment relation itself.”<sup>113</sup>

Both *Ellerth* and *Faragher* analyzed the nature of the supervisor’s position to establish the additional element justifying the imposition of vicarious liability on the employer for the acts of a supervisor.<sup>114</sup> The Court, in *Faragher*, argued that “employers have a greater opportunity and incentive to screen [supervisors], train them, and monitor their performance” than with the common worker.<sup>115</sup> In *Ellerth*, the Court noted that there are more factors than the employment relationship that aid supervisors to commit harassment.<sup>116</sup> Nevertheless, it is the company that empowers the supervisor to make decisions regarding a subordinate’s employment and to take tangible employment action.<sup>117</sup> Therefore, both opinions imposed vicarious liability on the employer for harassment resulting in a tangible employment action.<sup>118</sup>

## 2. Squaring Vicarious Liability with *Meritor*: The Affirmative Defense

Because the Court imposed vicarious liability on employers for supervisor harassment involving a tangible employment action, it was required to square this decision with *Meritor*’s mandate that employer liability for sexual harassment not be automatic.<sup>119</sup> Therefore, in an

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110. See *Ellerth*, 524 U.S. at 760.

111. See *id.*

112. See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986).

113. *Ellerth*, 524 U.S. at 760.

114. See *id.* at 760–63; *Faragher*, 524 U.S. at 803.

115. *Faragher*, 524 U.S. at 803.

116. See *Ellerth*, 524 U.S. at 760–61.

117. See *id.* The Court noted that “only the supervisor, or other person acting with the authority of the company, can cause this sort of injury.” *Id.* at 762. See also *Faragher*, 524 U.S. at 803. The Court explained that “an employee generally cannot check a supervisor’s abusive conduct the same way that she might deal with abuse from a co-worker.” *Faragher*, 524 U.S. at 803.

118. See *Ellerth*, 524 U.S. at 762; *Faragher*, 524 U.S. at 807.

119. See *Ellerth*, 524 U.S. at 763. “We are bound by our holding in *Meritor* that agency principles constrain the imposition of vicarious liability in cases of supervisory harassment.” *Id.*; see also *Faragher*, 524 U.S. at 804. “We are not entitled to recognize . . . [vicarious liabil-

attempt to "limit" the liability of employers, the Court created the "affirmative defense to liability in some circumstances, even when a supervisor has created the actionable environment."<sup>120</sup>

In order to justify the new standard of employer liability, the Court in *Ellerth* noted that *Meritor* did not limit the allowable inquiry to agency principles, but "acknowledged other considerations might be relevant as well."<sup>121</sup> One consideration was Title VII's "promotion of conciliation, rather than litigation," which the Court reasoned would be served by premising employer liability on the employer's efforts to create anti-harassment policies.<sup>122</sup> Title VII's policy of deterrence is, therefore, served by placing a limit on liability where the employee does not reasonably report harassment by encouraging employees to act.<sup>123</sup> Furthermore, placing a burden on the employee to report harassment "reflects an . . . obvious policy imported from the general theory of damages, that a victim has a duty 'to use such means as are reasonable under the circumstances to avoid or minimize the damages' that result from violations of the statute."<sup>124</sup> In light of these considerations, the Court created the affirmative defense that takes into account the reasonableness of an employer's preventive and remedial measures *and* the reasonableness of an employee's response to a harassing situation.<sup>125</sup>

#### D. The Dissenting Opinion

Justice Thomas, joined by Justice Scalia, authored dissenting opinions in *Faragher* and *Ellerth*.<sup>126</sup> The dissent objected to the different treatment given to racial harassment and sexual harassment cases.<sup>127</sup> When an employee alleges a racially hostile work environ-

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ity] . . . under Title VII unless we can square it with *Meritor*'s holding that an employer is not 'automatically' liable for harassment by a supervisor who creates the requisite degree of discrimination." *Faragher*, 524 U.S. at 804. The Court also felt constrained by Congress, which had "not altered *Meritor*'s rule even though it ha[d] made significant amendments to Title VII in the interim." *Ellerth*, 524 U.S. at 763-64.

120. *Faragher*, 524 U.S. at 804. See *supra* text accompanying note 87 (reciting the affirmative defense).

121. *Ellerth*, 524 U.S. at 764.

122. See *id.*

123. See *id.*

124. *Faragher*, 524 U.S. at 806 (quoting *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 n.15 (1982)).

125. See *id.* at 807; see also *Ellerth*, 524 U.S. at 764-65.

126. See *Ellerth*, 524 U.S. at 766 (Thomas, J., dissenting); see also *Faragher*, 524 U.S. at 810 (Thomas, J., dissenting). Justice Thomas dissented in *Faragher* for the same reasons he set forth in *Ellerth*. See *Faragher*, 524 U.S. at 810 (Thomas, J., dissenting).

127. See *Ellerth*, 524 U.S. at 767 (Thomas, J., dissenting).

ment, Justice Thomas noted, "the employer is liable only for negligence: that is, only if the employer knew, or in the exercise of reasonable care should have known, about the harassment and failed to take remedial action."<sup>128</sup> The dissent advocated a negligence standard in sexual harassment cases, because harassment is a problem employers could not completely prevent "without taking extraordinary measures—constant video and audio surveillance, for example—that would revolutionize the workplace in a manner incompatible with a free society."<sup>129</sup>

Despite the majority's creation of an affirmative defense for employers, the dissent reiterated that the decision was "in considerable tension with [the Court's] holding in *Meritor* that employers are not strictly liable for a supervisor's sexual harassment."<sup>130</sup> The dissent objected to the creation of a new affirmative defense with "shockingly little guidance about how employers can actually avoid vicarious liability."<sup>131</sup> The dissent claimed that this lack of guidance would ensure "a continuing reign of confusion in this important area of the law."<sup>132</sup>

Justice Thomas concluded that, under the majority's rule, "employers will be liable notwithstanding the affirmative defense, *even though they acted reasonably*, so long as the plaintiff in question fulfilled her duty of reasonable care to avoid harm."<sup>133</sup> The dissent continued, "[i]n practice, therefore, employer liability very well may be the rule."<sup>134</sup> This, the dissent concluded, "is the one result . . . Congress did *not* intend."<sup>135</sup>

### III. The Case: *Indest v. Freeman Decorating, Inc.*

Recently, in *Indest v. Freeman Decorating, Inc.*,<sup>136</sup> the Court of Appeals for the Fifth Circuit was presented with an opportunity to apply the *Ellerth/Faragher* standard of employer liability for sexual harassment by a supervisor.<sup>137</sup> However, the court found that an employer

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128. *Id.* at 768 (Thomas, J., dissenting).

129. *Id.* at 770 (Thomas, J., dissenting).

130. *Id.* at 773 (Thomas, J., dissenting).

131. *Id.* (Thomas, J., dissenting).

132. *Id.* at 771 (Thomas, J., dissenting).

133. *Id.* at 773 (Thomas, J., dissenting). An analysis of the holding supports this contention. For example, if an employee complains of harassment immediately, and the employer quickly responds by rectifying the situation, the employer will still be liable because of the employee's quick complaint.

134. *Id.* (Thomas, J., dissenting).

135. *Id.* at 774 (Thomas, J., dissenting).

136. 164 F.3d 258 (5th Cir. 1999).

137. *See id.* at 263.



accused of sexual harassment by a supervisor who creates a hostile work environment would not be held vicariously liable as long as the employer promptly and effectively responded to the complaint.<sup>138</sup> This decision was supported by two significantly conflicting opinions, with the third judge simply concurring in the judgment, leaving the circuit with no controlling rationale.<sup>139</sup>

### A. Facts and Procedural History

The plaintiff, Constance Indest, alleged that she was sexually harassed by Larry Arnaudet, the "vice-president responsible for the company's overall sales strategy and related policies, procedures, and systems."<sup>140</sup> On four occasions in a period of one week, "Arnaudet made crude sexual comments and sexual gestures to Indest while she was alone," as well as in the presence of others.<sup>141</sup> After one of the encounters, Indest told Arnaudet that his actions constituted sexual harassment.<sup>142</sup> In response, Arnaudet became angry, told Indest not to threaten a vice-president, disclaimed her abilities, and told her that she must prove herself to him by working with him at a future event in a different city.<sup>143</sup> Indest became agitated and cried.<sup>144</sup>

Indest complained to the company the same week the comments were made.<sup>145</sup> The company, Freeman Decorating, Inc. ("Freeman"), responded by investigating the claim pursuant to the company's sexual harassment policy,<sup>146</sup> interviewing witnesses, Indest's supervisors, and Arnaudet.<sup>147</sup> As a result of the investigation, the president and chairman of the company issued a verbal and written reprimand to Arnaudet, and Indest was informed of the reprimand.<sup>148</sup> Indest was

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138. *See id.* at 260.

139. *See Indest v. Freeman Decorating, Inc.*, 168 F.3d 795, 796 n.1 (5th Cir. 1999) (Wiener, J., specially concurring) (explaining that because no quorum exists, neither opinion constitutes precedent in the Fifth Circuit). On the date Judge Jones issued her opinion, Judge Wiener reserved the right to file a separate opinion, which he filed at a later date. *See id.* at 796. This Note will refer to the two opinions by their respective judges. Although the decision does not set precedent, it is analyzed in this Note to compare the two opinions, which the author believes demonstrates how lower courts will deal with the *Ellerth/Faragher* standard of liability.

140. *Indest*, 164 F.3d at 260.

141. *Id.*

142. *See id.*

143. *See id.*

144. *See id.*

145. *See id.*

146. *See id.*

147. *See id.*

148. *See id.*

also offered a formal apology from Arnaudet, which she refused.<sup>149</sup> Additionally, the company asked if she would like to give suggestions regarding possible disciplinary actions, which she also refused.<sup>150</sup>

Three days later, the company received a letter from Indest stating her intention to file a complaint with the Equal Employment Opportunity Commission because she feared retaliation by her employer.<sup>151</sup> The company, on two occasions, assured her that there would be no such retaliation and notified her that Arnaudet had been suspended, without pay, for seven days.<sup>152</sup> The company also notified Indest that she would never have to work with Arnaudet again, and "guaranteed that her complaint would neither jeopardize her job nor inhibit her ability to advance within the company."<sup>153</sup> In addition, the company offered to pay for any counseling she might need.<sup>154</sup> Furthermore, a high-ranking committee within the company was apprised of the situation and resolution.<sup>155</sup>

As a result of the harassment, Indest claimed she suffered the recurrence of an obsessive-compulsive disorder, anxiety, and sleeplessness, for which she received counseling.<sup>156</sup> Therefore, she filed an EEOC charge of sexual discrimination and harassment.<sup>157</sup> After receiving a right-to-sue letter from the EEOC, she filed suit against the company and against Arnaudet in his individual capacity.<sup>158</sup> The district court dismissed the claims against Arnaudet and granted judgment as a matter of law to the company based on the company's prompt remedial action, which the district court felt absolved it of any liability.<sup>159</sup> Indest appealed the judgment to the Fifth Circuit. All through the litigation and appeal, Indest continued to work for the company.<sup>160</sup> Subsequent to the incidents and resulting complaint, she received periodic pay raises and conceded that Arnaudet had not further harassed her.<sup>161</sup>

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149. *See id.* at 260-61.

150. *See id.* at 261.

151. *See id.*

152. *See id.*

153. *Id.*

154. *See id.*

155. *See id.*

156. *See id.*

157. *See id.*

158. *See id.*

159. *See id.*

160. *See id.*

161. *See id.*

## B. The Fifth Circuit Court of Appeals Decision

### 1. Opinion of Judge Jones

Judge Jones initially declared that the newly established principles stemming from the *Ellerth/Faragher* decisions would guide the court's decision.<sup>162</sup> She next analyzed whether the conduct alleged by Indest rose to the level of a "sexually hostile" working environment.<sup>163</sup> This was "a close question on [the] summary judgment record," but Judge Jones stated that "it is a question that we do not need to address, because there is another basis on which Indest's claim falls short."<sup>164</sup> Judge Jones concluded that "[e]ven if a hostile work environment claim had been stated . . . [the company's] . . . prompt remedial response relieves it of Title VII vicarious liability."<sup>165</sup>

Judge Jones then examined the *Ellerth/Faragher* decisions and concluded that they do not "directly speak to the circumstances before us, a case in which the plaintiff quickly resorted to . . . [the company's] . . . policy and grievance procedure against sexual harassment, and the employer took prompt remedial action."<sup>166</sup> The judge explained that a case involving only one isolated event that presents an "incipient" hostile environment in which the employer took prompt action should be distinguished from one in which the harassment continues in the company's ignorance.<sup>167</sup> After concluding that the *Ellerth/Faragher* decisions did not control the situation, Judge Jones stated that those cases, nevertheless, "inform[ ] the principles determinative of th[e] case."<sup>168</sup>

Judge Jones asserted that if an employee takes advantage of a grievance procedure, the harassment would normally stop before rising to an actionable hostile working environment.<sup>169</sup> She reasoned that "[t]his result effectuates the purpose of Title VII, which cannot guarantee civility in the American workplace but, at its best, inspires

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162. See *id.* at 263.

163. See *id.* at 263-64.

164. *Id.* at 264.

165. *Id.* at 267 (emphasis added). Judge Jones's assertion demonstrates the dilemma faced by lower courts. If Judge Jones concluded that a hostile work environment was stated, then the employer is required to prove both elements of the affirmative defense and not solely the employer's prompt response. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (noting that the defense "compromises two necessary elements").

166. *Indest*, 164 F.3d at 265.

167. See *id.*

168. *Id.*

169. See *id.*

prophylactic measures to deter unwanted sexual harassment.”<sup>170</sup> Furthermore, an employee will receive the deterrent benefit of Title VII by promptly complaining because “an actionable hostile environment claim will *rarely* if ever have matured.”<sup>171</sup> In terms of liability, she concluded that the “company’s swift response to the plaintiff’s complaint should have consequences for its vicarious liability exposure precisely because the company forestalled the creation of a hostile environment.”<sup>172</sup>

Judge Jones based her decision on *Meritor*’s holding that an employer is not automatically liable for harassment by a supervisor who commits the requisite degree of sexual harassment.<sup>173</sup> She noted that *Meritor* was left intact by *Ellerth/Faragher* because of the doctrine of stare decisis.<sup>174</sup> Judge Jones concluded that “[i]mposing vicarious liability on an employer for a supervisor’s ‘hostile environment’ actions despite its swift and appropriate remedial response to the victim’s complaint would thus undermine not only *Meritor* but Title VII’s deterrent policy.”<sup>175</sup> She squared this conclusion with *Ellerth/Faragher* by reasoning that a rule “imposing vicarious liability notwithstanding the employer’s having nipped a hostile environment in the bud” would conflict with agency law, which was the foundation for the *Ellerth/Faragher* decisions.<sup>176</sup> Applying the facts to this analysis, Judge Jones held that the employer was not liable as a matter of law, because Indest promptly complained, and the company properly responded, which ultimately “stopped the harassment.”<sup>177</sup>

## 2. Concurring Opinion of Judge Wiener

Approximately five weeks after the issuance of Judge Jones’s opinion, Judge Wiener issued an opinion, specially concurring,<sup>178</sup> agreeing that the district court should be affirmed, but for “significantly different reasons” than those presented by Judge Jones.<sup>179</sup> Judge Wie-

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170. *Id.*

171. *Id.* (emphasis added).

172. *Id.* at 266.

173. *See id.* (citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 804 (1998)).

174. *See id.*

175. *Id.*

176. *Id.* This conclusion rests on the presumption that an employer who promptly responds to a hostile work environment has demonstrated that the supervisor was not aided by the agency relationship when the harassment was committed. *See id.*

177. *Id.* at 267.

178. *See Indest v. Freeman Decorating, Inc.*, 168 F.3d 795, 796 (5th Cir. 1999) (Wiener, J., concurring).

179. *Id.* (Wiener, J., concurring).

ner opened his opinion by questioning whether the straightforward analyses of *Ellerth* and *Faragher* were controlling over the case.<sup>180</sup> In fact, he claimed, *Ellerth/Faragher* control all cases in which an employee seeks to hold his or her employer vicariously liable for a supervisor's sexual harassment.<sup>181</sup>

Judge Wiener's disposition of the case rested on the premise that the behavior Indest complained of did not rise to the level required for a hostile environment case.<sup>182</sup> He concluded that the threshold to recovery in a hostile environment case was the existence of severe or pervasive conduct on the part of the alleged harasser.<sup>183</sup> Judge Wiener considered Judge Jones's opinion to be an improper application of the law and, therefore, reevaluated the facts of *Indest* according to the principles set forth in *Ellerth/Faragher*.<sup>184</sup>

Judge Wiener disagreed with Judge Jones's assumption that Arnaudet's behavior rose to an actionable level.<sup>185</sup> Judge Wiener analyzed the facts under the *Harris* standard for a hostile work environment,<sup>186</sup> and concluded that the relatively isolated remarks, although "embarrassing and contemptible, boorish and offensive," were not "so severe and pervasive as to alter the terms and conditions of Indest's employment within the meaning of Title VII."<sup>187</sup> Judge Wiener concluded that "[i]t is on this basis that, post-*Ellerth* and *Faragher*, I would affirm the district court's grant of summary judgment in favor of Freeman."<sup>188</sup>

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180. See *id.* (Wiener, J., concurring).

181. See *id.* (Wiener, J., concurring).

182. See *id.* at 802-03 (Wiener, J., concurring).

183. See *id.* at 796 (Wiener, J., concurring).

184. See *id.* at 797 (Wiener, J., concurring).

185. See *id.* at 802. (Wiener, J., concurring).

186. See discussion *supra* Part I.B.

187. *Indest*, 168 F.3d at 803 (Wiener, J., concurring). However, it is important to note that Judge Wiener recognized that a situation could exist in which a supervisor could engage "in sufficiently severe conduct . . . in such a short period of time that, even though (1) the employee reports the conduct immediately, (2) the employer takes swift and decisive remedial action, and (3) no tangible employment actions ensues, the employer could still be held vicariously liable under . . . *Ellerth/Faragher*." *Id.* at 804 n.52 (Wiener, J., concurring). Judge Wiener expressed some hesitation about what would be the proper response to such a situation by stating, "[w]hether or not Judge Jones or I would agree with such a result, we remain bound by the Supreme Court's judgment in the matter." *Id.* (Wiener, J., concurring). With regard to such a situation, the Court of Appeals for the Eighth Circuit noted that the Supreme Court intended to avoid automatic liability for employers and to give credit to employers who take steps to prevent and correct harassment, but instead created a defense that would not protect employers in cases of single, severe conduct. See *Todd v. Ortho Biotech, Inc.*, 173 F.3d 595, 597 (8th Cir. 1999).

188. *Indest*, 168 F.3d at 803 (Wiener, J., concurring).

Judge Wiener also disputed Judge Jones's conclusion that the prompt reporting and equally prompt response to the harassment removed the case from the *Ellerth/Faragher* holdings.<sup>189</sup> In sum, Judge Wiener stated:

Neither the structure nor the plain language and holding of either *Ellerth* or *Faragher* supports Judge Jones's conclusion that cases such as this one, in which an employee promptly reports, and an employer rapidly responds to, harassing behavior by a supervisor, fall into some unarticulated lacuna on the *Ellerth/Faragher* framework.<sup>190</sup>

In Judge Wiener's opinion, the fact that Indest immediately complained made the affirmative defense unavailable to the company because her prompt complaint was reasonable, thereby eliminating the possibility of Freeman proving the second element of the affirmative defense.<sup>191</sup>

In conclusion, Judge Wiener noted that the panel should have ended its inquiry with a conclusion that the behavior complained of did not rise to a level that implicates Title VII.<sup>192</sup> However, in an apparent attempt to provide guidance for lower courts, Judge Wiener continued by explaining the process of deciding sexual harassment claims. The analysis began with a determination of whether a tangible employment action occurred.<sup>193</sup> Because there was no tangible employment action at issue, Judge Wiener instructed that it was necessary to make a determination whether the conduct rose to the requisite hostile work environment, i.e., whether the conduct was "severe or pervasive."<sup>194</sup> Only if the conduct is sufficiently "severe or pervasive" does the employer need to escape liability by proving both elements of the affirmative defense.<sup>195</sup>

#### IV. Analysis and Criticism

##### A. *Indest* Does Not Comply with *Ellerth/Faragher*

The facts of *Indest* indicate the alleged harassment was relatively isolated. The harassment took place over a period of one week and

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189. See *id.* at 798 (Wiener, J., concurring).

190. *Id.* at 801 (Wiener, J., concurring).

191. See *id.* at 802 (Wiener, J., concurring). Judge Wiener noted that Indest's prompt reporting "alone interdicts any attempt by Freeman to assert the one surviving affirmative defense and exposes the invalidity of excusing Freeman solely on the basis of its grievance system and prompt response, as proposed by Judge Jones." *Id.* (Wiener, J., concurring).

192. See *id.* at 806 (Wiener, J., concurring).

193. See *id.* at 805-06 (Wiener, J., concurring).

194. See *id.* (Wiener, J., concurring).

195. See *id.* (Wiener, J., concurring).

was reported to management soon after it occurred.<sup>196</sup> Judge Jones asserted that it was the brevity of the incident, and the company's prompt response, that removed it from the principles laid down in *Ellerth/Faragher*.<sup>197</sup> However, the *Ellerth/Faragher* decisions do not support the conclusions that brief incidents which were promptly responded to protect an employer from liability or preclude an employer from presenting the affirmative defense.<sup>198</sup> This is precisely the situation that Justice Thomas recognized in his dissenting opinion in *Ellerth* when he stated, "employers will be liable . . . *even though they acted reasonably*, so long as the plaintiff in question fulfilled *her* duty of reasonable care."<sup>199</sup> Likewise, in guidelines issued as a response to *Ellerth/Faragher*, the EEOC also opposed Judge Jones's conclusion by stating that "[i]f both parties exercise reasonable care, the defense will fail."<sup>200</sup>

Literally applying Judge Jones's analysis, a court should not hold an employer liable if the employer took prompt action to correct a harassing situation, notwithstanding the reasonable response of the employee. Indeed, the Court of Appeals for the Eleventh Circuit concluded that "a prompt response by an authorized agent to halt reported harassment is sufficient to relieve the employer of liability under Title VII in cases where the harassment has not culminated in the taking by a supervisor of a tangible employment action against the victim."<sup>201</sup> Judge Jones was able to circumvent *Ellerth* and *Faragher* and

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196. See *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 260 (5th Cir. 1999).

197. See *id.* at 265.

198. See *supra* text accompanying notes 90, 187.

199. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 773 (1998) (Thomas, J., dissenting).

200. Equal Employment Opportunity Comm'n, *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*, No. 915.002, Part V(B), at <http://www.eeoc.gov/docs/harassment.html> (June 18, 1999). This is in stark contrast to the EEOC's prior position that in such a situation, an employer would be liable if "it ha[d] actual knowledge of the harassment or if, considering all the facts of the case, the victim in question had no reasonably available avenue for making his or her complaint known to appropriate management officials." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 71 (1986).

201. *Coates v. Sundor Brands, Inc.*, 164 F.3d 1361, 1369 (11th Cir. 1999) (Barkett, J., specially concurring). Additionally, two unpublished circuit court opinions support the conclusion that an employer's prompt response should preclude liability. See *Barna v. City of Cleveland*, Nos. 96-3971, 96-4178, 97-4130, 1998 WL 939884, at \*5 (6th Cir. Dec. 22, 1998) (unpublished opinion) (noting that "[f]airness requires only that an employer be given an opportunity to respond to an employee's complaint before being pulled into court"); *Watkins v. Prof'l Sec. Bureau*, No. 98-2555, 1999 WL 1032614, at \*5 n.16 (4th Cir. Nov. 15, 1999) (unpublished opinion) ("[W]e cannot conceive that an employer that satisfies the first element of the affirmative defense . . . would be held liable for the harassment on the basis of an inability to satisfy the literal terms of the second element.").

avoid imposing liability by deciding that the Supreme Court's holding does not apply to situations where the employee quickly responded by reporting the harassment.<sup>202</sup> However, *Ellerth/Faragher* do not support this assertion; neither decision addressed such a situation.<sup>203</sup> Furthermore, there is nothing in *Ellerth/Faragher* to indicate that the employer's prompt response alone is enough to preclude liability.

Judge Jones's opinion demonstrates the problem that exists in light of *Ellerth/Faragher*. Courts are reluctant to impose vicarious liability on an employer who acts with reasonable care before, during, and after an allegedly harassing situation occurs, regardless of the standard imposed by the United States Supreme Court. Judge Jones's opinion exemplifies how lower courts might resolve claims of sexual harassment by a supervisor where both of the parties act reasonably with respect to a harassing situation. However, this analysis does not conform to the mandate of the *Ellerth/Faragher* decisions.

Literally applying the *Ellerth/Faragher* standard to the facts of *Indest* would result in employer liability for the supervisor's conduct. In order for harassment to be actionable, it must result in a tangible employment action or create a hostile work environment.<sup>204</sup> Indest suffered no tangible employment action, but rather she alleged a hostile working environment based on verbal harassment by Arnaudet.<sup>205</sup> Assuming the court found the harassment to be actionable, the analysis would then move to the affirmative defense. Due to the company's immediate response, it is clear that it had in place an effective policy for reporting and correcting harassing situations. It is equally clear that Indest's prompt reporting of the harassment was a reasonable utilization of the policy. Therefore, despite the employer's prompt response, Indest acted reasonably by immediately reporting the offensive conduct, thereby eliminating the employer's affirmative defense under *Ellerth/Faragher*.<sup>206</sup>

## B. *Ellerth/Faragher* Creates a No-Win Situation for Employers

The Supreme Court in *Ellerth* stated that "[w]ere employer liability to depend in part on an employer's effort to create [grievance]

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202. See *Indest*, 164 F.3d at 265.

203. See Louis P. DiLorenzo, *Employer Liability for Supervisor Harassment After Ellerth and Faragher* (pt. V), 6 DUKE J. GENDER L. & POL'Y 3 (1999) (discussing questions that the Supreme Court left open in *Ellerth/Faragher*).

204. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 753-54 (1998).

205. See *Indest*, 164 F.3d at 260.

206. See *Ellerth*, 524 U.S. at 773 (Thomas, J., dissenting).



procedures, it would effect Congress' intention to promote conciliation rather than litigation in the Title VII context."<sup>207</sup> Ironically, however, a strict application of the affirmative defense established in *Ellerth/Faragher* would have the opposite result. An employee who acts reasonably in reporting harassing conduct, thereby destroying the employer's ability to prove the second element of the affirmative defense, will be encouraged to litigate.

In regard to the second element of the affirmative defense, the Court reasoned, "[t]o the extent [that] limiting employer liability could encourage employees to report harassing conduct before it becomes severe or pervasive, it would also serve Title VII's deterrent purpose."<sup>208</sup> However, while this element encourages employees to report harassing conduct after it has already occurred, it does not appear to deter harassing conduct before it occurs. In fact, it may actually deter employers from creating effective grievance policies, because the more effective a company policy is in encouraging an employee to report harassment, the less likely an employer will be able to prove the second element of the affirmative defense. In essence, the Supreme Court is asking employers to create policies that will leave them vicariously liable if harassment does occur.

An analysis of the affirmative defense supports the foregoing conclusions. In order to escape vicarious liability, an employer must prove both of the following elements: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of *any* preventive or corrective opportunities provided by the employer *or to avoid harm otherwise*."<sup>209</sup> The crux of the problem involves the second element, and the fact that the Supreme Court requires the employer to prove the existence of both elements. When an employee promptly reports a harassing situation, the first element of the defense becomes irrelevant, because the employer will be unable to establish the second element. Therefore, in nearly all situations where a harassed employee reports the conduct, or "avoids harm otherwise," the employer will be automatically liable—a result the Supreme Court claimed it was seeking to avoid.<sup>210</sup>

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207. *Id.* at 764 (citing *EEOC v. Shell Oil Co.*, 466 U.S. 54, 77 (1984)).

208. *Id.*

209. *Id.* at 765 (emphasis added).

210. *See id.* at 763.

## V. A Proposed Alternative Defense

This Note proposes an alternative solution to the *Ellerth/Faragher* defense that would solve the problems discussed above and alleviate the tension between *Ellerth/Faragher* and Judge Jones's opinion in *Indest*. Under this alternative defense, an employer could escape liability for a supervisor's creation of a hostile work environment by proving both of the following elements: (1) the employer exercised reasonable care by creating and maintaining preventative and remedial programs relating to sexual harassment; and (2) the employer exercised reasonable care in responding to notice that harassment has occurred. Because this approach focuses primarily on the behavior of the employer, it does not permit the situation created by the *Ellerth/Faragher* defense, where the actions of an employee alone effectively eliminate the possibility of the employer proving the elements of the affirmative defense. This proposed alternative defense therefore focuses on the actions of the employer—the party most effectively equipped to deal with harassment—thereby encouraging the employer to deal with harassment before, while, and after it occurs.

This proposed defense would urge both the employer and the employee to act reasonably, and would reward both for their respective conduct. Unlike the *Ellerth/Faragher* defense, the second element of the proposed defense focuses on the employer's response to notice of harassment. Though the focus remains on the employer, a factor in the reasonableness of the employer's response is necessarily the reasonableness of the employee's behavior. When an employee unreasonably fails to notify an employer of harassment, the reasonableness of the employer's response is bolstered because the employer is not expected to respond to conduct of which it is uninformed. On the other hand, an employer who receives a complaint, or is otherwise aware that harassment is occurring, and does not reasonably respond to the situation will not be able to prove the second element of the proposed defense. Therefore, the party acting unreasonably will be responsible for the harm: the employer if it does not act reasonably in creating and implementing a sexual harassment policy or responding to notice of sexual harassment; or the employee if he or she is unreasonable in allowing harassing conduct to continue in the face of reasonable measures provided by the employer.

An analysis of this proposed defense also demonstrates how it would both serve the deterrence goals of Title VII and promote conciliation rather than litigation. The first element, proof of reasonable programs dealing with sexual harassment, encourages the employer to

create and maintain sexual harassment programs, which likely will have a deterrent effect. Furthermore, the employer's liability is partially determined by the effectiveness of these programs under the second element, which will promote conciliation by encouraging employers to rectify harassment when it does occur. Because the effectiveness of the program is relevant to this analysis, the employer is encouraged not only to create sexual harassment programs, but also to systematically educate employees regarding the program's existence and to encourage employees to report harassment through the program's procedures.

Lastly, this alternative approach would eliminate the problem exposed by Judge Jones's opinion. The employer in *Indest* would be able to prove the elements of the proposed defense by focusing on the existence of a harassment program and the fact that the harassing situation was immediately eradicated. Courts would not be faced with situations that require liability to be imposed on an employer who has taken conscientious steps to prevent and eradicate harassment. Instead, courts would be able to reward such behavior by allowing the employer to be absolved of any liability. Furthermore, it would clarify the situation in which all parties act reasonably, a situation left muddy by *Ellerth/Faragher*, as evidenced by *Indest*.

## Conclusion

In conclusion, this Note urges Congress or the Supreme Court to revisit employer liability for sexual harassment. In doing so, the emphasis should be placed on the employer—that is, on the party being faced with the prospect of liability. The *Ellerth/Faragher* affirmative defense creates untenable results in situations where all parties have acted reasonably, or in the event of a single, severe act of harassment. Therefore, an alternative is needed that allows the employer to be absolved of liability based on the employer's efforts to prevent and correct harassment. Not only is such an approach arguably workable under all circumstances, it also serves to place liability where it belongs—on the unreasonable party.

